

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SUCCESSFACTORS, INC.,	)	
	)	
Plaintiff(s),	)	No. C08-1376 CW (BZ)
	)	
v.	)	<b>ORDER DENYING ADMINISTRATIVE</b>
	)	<b>MOTION FOR RELIEF TO SEAL</b>
SOFTSCAPE, INC.,	)	<b>AND SCHEDULING SHOW CAUSE</b>
	)	<b>HEARING</b>
Defendant(s).	)	
	)	
	)	

On July 30, 2008, plaintiff filed a motion to compel. The following day, plaintiff filed a motion for administrative relief to file under seal portions of exhibits filed in support of its motion to compel that defendant designated as confidential under the protective order and portions of its brief that referred to the exhibits that defendant designated. On August 6, 2008, defendant filed a declaration in support of the administrative motion .

The Local Rules provide that a "sealing order may issue only upon a request that establishes that the document, or portions thereof, is privileged or protectable as a trade secret otherwise entitled to protection under the law . . ."

1 N.D. Civil L.R. 79-5(a). "As a public forum, the Court has a  
2 policy of providing to the public full access to papers filed  
3 in the Office of the Clerk." Id. at Commentary. A request to  
4 seal must be "narrowly tailored" in order ensure that a copy  
5 of the document is "available for public review that has the  
6 minimum redactions necessary to protect sealable information."  
7 Id. and 79-5(a). When a party files a document designated  
8 confidential by another party, the burden shifts to the  
9 designating party to file a "declaration establishing that the  
10 designated information is sealable, and lodge and serve a  
11 narrowly tailored proposed sealing order, or [it] must  
12 withdraw the designation of confidentiality." Id. at 79-5(d).

13 A "'particularized showing,' [] under the 'good cause'  
14 standard of Rule 26(c) will 'suffice[] to warrant preserving  
15 the secrecy of sealed discovery material attached to  
16 non-dispositive motions.'" Kamakana v. City and County of  
17 Honolulu, 447 F.3d 1172, 1180 (9th Cir. 2006) *quoting* Foltz v.  
18 State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 & 1138  
19 (9th Cir. 2003). When "good cause" is established, "the court  
20 in which the action is pending may make any order which  
21 justice requires to protect a party or person from annoyance,  
22 embarrassment, oppression, or undue expense or burden,  
23 including ... that a trade secret or other confidential  
24 research, development, or commercial information not be  
25 revealed or be revealed only in a designated way." Fed. R.  
26 Civ. P. 26(c). "Under Rule 26(c), 'the party asserting good  
27 cause bears the burden, for each particular document it seeks  
28 to protect, of showing that specific prejudice or harm will

1 result if no protective order is granted.'" Contratto v.  
2 Ethicon, Inc., 227 F.R.D. 304, 307 (N.D. Cal. 2005) *quoting*  
3 Foltz, 331 F.3d at 1130. "Where a business is the party  
4 seeking protection, it will have to show that disclosure would  
5 cause significant harm to its competitive and financial  
6 position. That showing requires specific demonstrations of  
7 fact, supported where possible by affidavits and concrete  
8 examples, rather than broad, conclusory allegations of harm."  
9 Contratto, 227 F.R.D. at 307 - 08.

10 Defense counsel's declaration to establish that the  
11 designated information is sealable is not sufficient to  
12 support granting the administrative motion. Nor is the  
13 proposed order narrowly tailored as required by Local Rule 79-  
14 5(d). Defense counsel merely makes blanket assertions that  
15 large portions of the exhibits should be sealed. For example,  
16 defense counsel asserts that the designated materials contain  
17 discussion of "confidential internal marketing information and  
18 competitive strategies" and contain defendant's internal  
19 "employment information the disclosure of which could create a  
20 substantial risk of competitive harm" to defendant without  
21 making a particularized showing as to why defendant would  
22 suffer harm if the materials were not sealed. See e.g.  
23 Sinclair Decl. at ¶ 5. Defendant also argues that information  
24 about "acts involving a competitor" and testimony regarding  
25 non-party's documents or employees that it "would not normally  
26 reveal to third parties except in confidence" should be  
27 sealed. See e.g. Id. at ¶¶ 6 - 9. However, defendant fails  
28 to set specifically demonstrate how disclosure would harm

1 defendant or the non-parties.

2 Defendant requests that lines 238:4 - 14 of the 5/29/08  
3 and lines 282:1 - 285:15 of the 5/20/08 of the Watkins'  
4 transcript because the "information has previously been  
5 ordered sealed in the Joint Case Management Conference  
6 Statement" by Judge Wilken and because it contains information  
7 regarding acts of a competitor. However, Judge Wilken's June  
8 30, 2008 order only required that portions of 5 lines of the  
9 statement be sealed. Having reviewed the approximately 5  
10 pages of deposition testimony defendant requests to seal, it  
11 is evident that its request is excessive.

12 After reviewing the motion to compel and its supporting  
13 exhibits, it is apparent that there is not "good cause" to  
14 seal the vast majority of the materials defendant has  
15 designated. An example reflecting that defendant's excessive  
16 designation includes a portion of the Watkins' deposition  
17 transcript that defendant contends contains "confidential  
18 internal marketing information and competitive strategies"  
19 (Sinclair Decl. at ¶ 5).

20 A. He's responsible for strategic territory  
development.

21 Q. What does that mean?

22 A. It means he's working on strategic  
territories.

23 Q. What territories are those?

Mr. Davids: Objection Do you want to know the  
specific territories or just generally what  
his job entails?

24 A. The strategic ones.

25 Q. Which ones?

Mr. Davids: Objection.

26 A. The ones that are strategic.

27 Q. Can you tell me, please, what he's working on  
now?

A. What I call strategic.

28 Q. Does he have the New York area?

1 Watkins Depo. 5/30/08, lines 360:7 - 24. Another example from  
 2 the Watkins' deposition includes defendant's designation of  
 3 the following testimony as confidential because it "discloses  
 4 information relating to internal operational information and  
 5 communications between Softscape employees and Softscape"  
 6 (Sinclair Decl. at ¶ 10).

7 A. In 2008?

8 Q. Correct.

9 A. I do not recall what I may have done in  
 2008.

10 Q. Were there changes made to the appearance  
 of the website?

11 A. I don't - -

12 Q. I don't recall specifically logging in and  
 making changes to the appearance. I don't  
 recall.

13 Q. Were there changes to the appearance of  
 the website?

14 . . . .

15 Q. Does anyone other than you have  
 responsibility for the New Millennium Shoe  
 website?

16 A. No.

17 Watkins Depo. 5/29/08, lines 234:1 - 12 & 22 - 24.

18 Defendant also designated its responses<sup>1</sup> and amended  
 19 responses to plaintiff's first set of interrogatories as  
 20 confidential, in their entirety. It contends the responses  
 21 contain information that it would not normally reveal to third  
 22 parties, without explaining how it would be harmed if the  
 23 responses were not sealed. Defendant also contends the  
 24 responses should be sealed because they contain facts and  
 25 information about the presentation at issue in this lawsuit  
 26 that plaintiff has designated as confidential. Plaintiff's  
 27 declaration in support of the sealing order did not state that

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28 <sup>1</sup> The first response appears to contain only  
 objections and no confidential information.

1 it designated all information and facts regarding the  
2 presentation as confidential. Furthermore, designating the  
3 responses in their entirety as confidential is excessive.  
4 Similarly, defendant argues that certain emails and  
5 correspondence between counsel should be sealed in their  
6 entirety, rather than designating the portions that might  
7 contain confidential or proprietary information. Another  
8 example of excessive designation is the request to seal  
9 exhibit 29, instead of just requesting that the telephone  
10 numbers contained in the exhibit be sealed.

11 Defendant also requests that I seal all references in the  
12 brief in support of the motion to compel that refer, in way,  
13 to the documents it has excessively designated as confidential  
14 resulting in absurd requests to seal. For example, defendant  
15 requests sealing a portion of a sentence in the motion to  
16 compel accusing it of producing only a "paltry number" of  
17 versions of a presentation at issue. The portion of the  
18 sentence only sets forth plaintiff's grounds for bringing the  
19 motion to compel without reflecting confidential information.  
20 Defendant also requests that the entire Watkins' Declaration  
21 initially filed on March 26, 2008 be sealed, when only  
22 portions of the declaration were filed under seal originally.

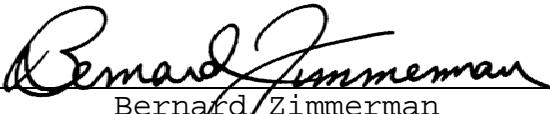
23 The examples set forth supra are not an exhaustive  
24 representation of the defendant's abuse of the confidentiality  
25 designation requirements. The court finds no need for  
26 argument. Plaintiff's administrative motion to seal is  
27 **DENIED.**

28 In light of defense counsel's disregard for the Local

1 Rules, which caused the court to spend an inordinate amount of  
2 time on this administrative motion, the imposition of  
3 sanctions on counsel appears warranted. Civil Local Rule 1-4  
4 provides that "[f]ailure by counsel or a party to comply with  
5 any duly promulgated local rule or any Federal Rule may be a  
6 ground for imposition of any authorized sanction." See also  
7 MEMC Elec. Materials v. Mitsubishi Materials Silicon Corp.,  
8 No. C01-4925 SBA, 2004 WL 5363616, at \*2 (N.D. Cal. March 4,  
9 2004).

10 Accordingly, **IT IS HEREBY ORDERED** that defendant and its  
11 counsel shall show cause on **Wednesday, September 3, 2008, at**  
12 **10:00 a.m.**, in Courtroom G, 15th Floor, Federal Building, 450  
13 Golden Gate Avenue, San Francisco, California 94102, why  
14 sanctions should not be imposed under Federal Rule of Civil  
15 Procedure 16(f) and Civil L.R. 1-4. If they wish to avoid the  
16 hearing, they may contribute **\$500.00** to **St. Anthony's Dining**  
17 **Room**, 121 Golden Gate Avenue, San Francisco, CA 94102 or **Glide**  
18 **Memorial Church Food Program**, 330 Ellis, San Francisco, CA  
19 94102. If proof of payment is received in chambers on or  
20 before **August 27, 2008** the Order To Show Cause will be  
21 discharged and there will be no hearing.

22 Dated: August 19, 2008

23  
24   
25 Bernard Zimmerman  
26 United States Magistrate Judge  
27